Supreme Court, U.S.
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93-191

No. _____

In The

Supreme Court of the United States

October Term, 1993

EF OPERATING CORPORATION t/a
WEST MOTOR FREIGHT OF PA,

Petitioner,

vs.

S.S. FISHER STEEL CORPORATION and
M.P. FLAHERTY ASSOC., INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTIONS PRESENTED

I. Did the District Court commit error when it granted Summary Judgment for the Defendant S.S. Fisher Steel Corporation and denied Summary Judgment for the Plaintiff EF Operating Corporation t/a West Motor Freight of PA under the provision of the Interstate Commerce Act as set out at 49 U.S.C. § 10101 et seq.? Suggested Answer: Yes.

II. Did the District Court commit error when it granted Summary Judgment for the Defendant M.P. Flaherty Assoc., Inc. and denied Summary Judgment for the Plaintiff EF Operating Corporation t/a West Motor Freight of PA under the provisions of the Interstate Commerce Act as set out at 49 U.S.C. § 10101 et seq.? Suggested Answer: Yes.

III. When a shipper-consignor defaults on payment of freight charges, does equitable estoppel preclude a carrier, delivering goods under a bill of lading marked "pre-paid", from collecting freight charges from a consignee who had paid the shipper-consignor? Suggested Answer: No.

LIST OF ALL PARTIES TO THE PROCEEDINGS WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The Respondents in this Writ of Certiorari to the United States Court of Appeals for the Third Circuit are: S.S. Fisher Steel Corporation and M.P. Flaherty Assoc. Inc.[1]

LIST OF PARENT COMPANIES AND SUBSIDIARIES

None.

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[1] Case captioned in the United States Court of Appeals for the Third Circuit as EF Operating Corporation t/a West Motor Freight of PA v. American Builders, et al. American Builders was dismissed as a party in the Third Circuit case by Court Order dated November 9, 1992.

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No. _____

In The

Supreme Court of the United States

October Term, 1993

EF OPERATING CORPORATION t/a
WEST MOTOR FREIGHT OF PA,

Petitioner,

vs.

S.S. FISHER STEEL CORPORATION and
M.P. FLAHERTY ASSOC., INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Pursuant to Rules 12.1 and 14 of the Rules of the Supreme Court of the United States, Petitioner, EF Operating Corporation t/a West Motor Freight of PA, files this statement of facts upon which it is contended that the Supreme Court of the United States has jurisdiction to review the decision of the United States Court of Appeals for the Third Circuit entered on May 10, 1993 and the decision as a result of the Petition for Rehearing In Banc

on June 3, 1993, and should exercise such jurisdiction herein.

The decisions and opinions of the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit are included herein.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari arises from an action to recover freight charges by the Petitioner EF Operating Corporation t/a West Motor Freight of PA. The Order of the United States District Court for the Eastern District of Pennsylvania was filed July 7, 1992 in Case No. 92-0858. A timely Notice of Appeal was filed in the United States Court of Appeals for the Third Circuit on July 22, 1992. A panel of the United States Court of Appeals for the Third Circuit filed its decision on May 10, 1993. Petitioner filed a timely Petition for Rehearing In Banc from the Panel's decision from the United States Court of Appeals for the Third Circuit on May 18, 1993. On June 3, 1993, the United States Court of Appeals for the Third Circuit denied Petitioner's Petition for Reconsideration In Banc.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, § 1254(1).

Cases that sustain the jurisdiction of this Court include, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 496 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990); *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533,

103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982); *Texas & P.R. Co. v. Interstate Commerce Com.*, 162 U.S. 197, 16 S.Ct. 666, 40 L.Ed. 940 (1896), and *Union Pacific R. Co. v. Goodridge*, 149 U.S. 680, 13 S.Ct. 970, 37 L.Ed. 896 (1893).

STATUTES INVOLVED

The Petitioner respectfully prays this Court to review the issue of the collection of a common motor carrier's lawful freight charges for shipments of goods received even though the consignee had paid the shipper-consignor for the freight charges and the common motor carrier has not been paid, pursuant to 49 U.S.C. §§ 10521, 10741, 10741(a), 10743, 10743(a), 10744, 10761, 10762(a)(1), 10921 and 11902.

STATEMENT OF THE CASE

The facts of the case underlying this Petition for Writ of Certiorari are as follows:

The Plaintiff was a common motor carrier with its tariffs on file with the Interstate Commerce Commission. Tex-Ark Joist Company (presently adjudged a bankrupt) contacted the Plaintiff at its principal place of business located at Boyertown, Pennsylvania and requested the Plaintiff to furnish trailers to Tex-Ark Joist to transport shipments of steel joists and steel attachments from Tex-Ark Joists, facilities located at Lebanon, Pennsylvania to

various points in other states. The Defendants in this case were consignees of the aforementioned shipments. The Defendants paid Tex-Ark Joist Company for the shipments and freight charges under their respective contracts with Tex-Ark Joist. The Plaintiff was not privy to these underlying contracts. Therefore, the payment of the freight charges to Tex-Ark Joist certainly granted Tex-Ark Joist the authority to act as an agent on behalf of the consignee to arrange the transportation of the freight at issue.

After completion of the above-captioned shipments, the Plaintiff requested payment of its lawful freight charges. Tex-Ark Joist Company refused to pay the Plaintiff's freight charges. Later, as a result of a Chapter 11 Bankruptcy, Tex-Ark Joist Company had no money to pay its unsecured creditors including the Plaintiff.

Plaintiff then made repeated demands for payment of its freight charges to all of the consignee Defendants in this matter.

Plaintiff brought the action to collect its lawful freight charges pursuant to numerous decisions of this Court and the provisions of 49 U.S.C. § 10101 et seq. "The Interstate Commerce Act."

REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari presents important and substantial questions, as herein described, in that the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for

the Third Circuit decisions are in direct conflict with the decisions of this Court and Title 49 § 10101 et seq. "the Interstate Commerce Act" pertaining to the collection of freight charges by a common motor carrier.

The instant case should be reviewed by this Court for the following reasons:

1. Various Circuit Courts of Appeal have held that when a carrier delivers goods under a bill of lading marked "prepaid", and the consignee pays the shipper-consignor the freight charges pursuant to the terms and conditions of the bill of lading, the carrier is equitably estopped from collecting the freight charges from the consignee. See *Missouri Pacific R.R. Co. v. National Milling Co.*, 409 F.2d 882 (3d Cir. 1969); *United States v. Mason & Dixon Lines, Inc.*, 222 F.2d 646 (6th Cir. 1955); *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971); *Southern Pacific Transp. Co. v. Campbell Soup Co.*, 455 F.2d 1219 (8th Cir. 1972). This Court addressed the equitable estoppel issue in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982) when the consignor shipped goods to the consignee and argued that the carrier was estopped from collecting its lawful freight charges due to credit regulation violations. In *Southern Pacific, ibid.* this Court held that the shipper could not assert an affirmative defense against the carrier based upon its violation of the Interstate Commerce Commission's credit regulations. This Court in its opinion did discuss the various Circuit Court opinions concerning "double payment" cases, but this specific issue was not before this Court. This Court went on to write that there is a "time honored rule" that

no act or omission of the carrier, except for the running of the statute of limitations will estop or preclude the carrier from enforcing payment of the full amount of its freight charges from the person liable. The most recent case before this Court which addressed the issue of equitable estoppel was *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 496 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). In *Maislin, ibid.*, Justice Brennan in his opinion wrote at S.Ct. 2766, "This court has read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff." Therefore, despite the interpretation by the Third Circuit Court of Appeals, this Court has spoken regarding this issue, and as the Court wrote in *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 75 L.Ed.2d 260 (1983), "Needless to say, only this Court may overrule one of its precedents."

2. The Court of Appeals in rendering its decision has effectively overruled this Court's decision in *Maislin, ibid.* The Third Circuit Court of Appeals in their decision rendered an overly expanded interpretation of this Court's decision in *Maislin, ibid.* when it permitted equitable defenses to dismiss an attempt by the carrier to collect its lawfully filed freight charges. *Maislin, ibid.* states there are no equitable defenses to the filed tariff rate of a common motor carrier. If the decision of the Third Circuit is followed, then the carrier will be precluded from ever being able to file a Complaint, let alone assert its tariff provisions, and certainly this totally defeats the decision of this Court in *Maislin, ibid.*, because the carrier will never be able to file a Complaint, let alone

assert its filed tariff provisions in order to recover its freight charges.

3. The Courts below, in their various decisions in this case, completely ignored and did not discuss, nor distinguish, nor state, why they were not applying the provisions of 49 U.S.C. § 10744 of the Interstate Commerce Act which concerns the liability for payment of a motor carrier's freight charges.

4. The District Court failed to address and/or acknowledge in its opinion, the decision of this Court in *Maislin, ibid.*, and therefore, committed error in failing to do so.

This case concerns the collection of a motor carrier's lawful freight charges which is identical to the issue which Justice Brennan addressed in his opinion in *Maislin, ibid.*, when he wrote at page 2766, "This court has read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff."

5. The Court of Appeals for the Third Circuit misinterpreted the decision of this Court in *Maislin, ibid.*, when it wrote (opinion p. 8), "the Maislin Court did not hold that a carrier must, regardless of the circumstances, receive its freight charges; rather, it held that the rate charged must be the filed rate." There is nothing in the opinion of Justice Brennan that states that the case must be read so narrowly. In addition, in rendering its decision, the Court totally ignored the provisions of 49 U.S.C. § 10743(a) which certainly requires a carrier to seek payment of its lawful freight charges and the various decisions of this Court concluding that when a carrier fails to

seek payment of its freight charges that this may very well result in a rebate situation which clearly has been forbidden since the initial passage of the Act in 1887.

6. The Third Circuit's decision has set precedence for a rebate to occur, contrary to the provisions of 49 U.S.C. § 10741 and 49 U.S.C. § 11902 and a long line of decisions by this Court. If the Respondents are permitted to assert a defense that they paid a party to act as their agent for the payment of freight charges, pursuant to a contract between the Respondent and their vendor, the Panel is clearly permitting the consignees to receive what is in fact a rebate from its agent, in that it is not required to pay the carrier's lawful freight charges, which is contrary to the provisions of 49 U.S.C. § 10744. In addition, the decision of the Third Circuit clearly permits a consignor and consignee to enter into a contract which is clearly contrary to the provisions of the Interstate Commerce Act, and to effectively deny to a carrier its right to recover its lawful freight charges which clearly has not been the law since 1887, see *Union Pacific R. Co. v. Goodridge*, 149 U.S. 680, 13 S.Ct. 970, 37 L.Ed. 896 (1893) and *Texas & P.R. Co. v. Interstate Commerce Com.*, 162 U.S. 197, 16 S.Ct. 666, 40 L.Ed. 940 (1896). In fact, the statute is clear when it set out the responsibilities of the shipper and the consignee at 49 U.S.C. §§ 10743 and 10744.

7. In addition to all of the above, the Courts below clearly misunderstood the agency relationship between the parties when they found that the carrier was estopped from collecting its lawful freight charges. The consignees in this matter paid the shipper the carrier's freight charges, and as a result, the shipper prepared a bill of

lading, reading "prepaid" and presented this to the carrier. Therefore, the nature of the relationship is quite clear, the consignee was the principle for the payment of the freight charges, in that it authorized the consignor to be its agent for the purpose of paying the lawful freight charges to the carrier as a third party beneficiary. It is certainly black letter law that when a principle entrusts an agent to perform an activity, and the agent fails to perform through no fault of a third party, that the principle is still liable for the original transaction until the agent performs as instructed. It is quite clear, that payment to the shipper's agent is not payment to the motor common carrier under any common law principle of agency law, let alone the Interstate Commerce Act.

8. The Courts below have attempted to overrule this Court and its long history of decisions stating that " . . . a carrier has not only the right, but also the duty to recover its proper charges for services performed." See *Louisville & Nashville R. Co. v. Central Iron Co.*, 265 U.S. 59, 44 S.Ct. 444, 68 L.Ed. 900 (1924); see also, *Pittsburgh C., C. & St. L. R. Co. v. Fink*, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151 (1919). Clearly this is not the law and, as this Court wrote in *Thurston, ibid.*, they simply committed error and abused their decision-making capacity and authority when they rendered the decision below.

CONCLUSION

For the reasons stated above, Petitioner respectfully prays this Honorable Court to grant the Petitioner's Petition for a Writ of Certiorari to the United States Court of

Appeals for the Third Circuit and submits that this Petition brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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(215) 372-6400

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EF OPERATING CORP., *et. al.*	:	Civil Action
v.	:	
AMERICAN BUILDERS, *et. al.*	:	No. 92-0858

ORDER

(Filed May 18, 1992)

CAHN, J. May 18, 1992

AND NOW, this 18th day of May, 1992, upon consideration of the Motion for Summary Judgment filed by defendant S.S. Fisher Steel Corp., IT IS ORDERED that the Motion is GRANTED, and judgment is ENTERED against plaintiff EF Operating Corp. and in favor of defendant S.S. Fisher Steel Corp.[1]

---

[1] The plaintiff in this case is a common carrier. As such, it is governed by the terms of the Interstate Commerce Act (presently codified at 49 U.S.C. § 10101, *et. seq.*). Although the Interstate Commerce Act has been recodified several times, the substance of the Act has not changed. *See In Re Roll Form Products, Inc.*, 662 F.2d 150, 153 n.5 (2d Cir. 1981). The plaintiff now seeks to recover freight charges from the consignee (the recipient) of several shipments of goods, since it has been unable to recover these charges from the consignor (the shipper). In support of its claim, the carrier relies upon the rule that a common carrier *must* recover the charges due under the applicable tariff. *See Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 343-44 (1982); *Pittsburgh, Cincinnati, Chicago & St. Louis RR Co. v. Fink*, 250 U.S. 577, 581-82 (1919). Like most rules, however, there is an exception. *See In Re Penn-Dixie Steel Corp.*, 6

BY THE COURT:

/s/ Edward N. Cahn
Edward N. Cahn, J.

B.R. 817, 820 (Bankr. S.D.N.Y. 1980), *aff'd*, 10 B.R. 878 (S.D.N.Y. 1981).

Specifically, if a consignee has accepted a shipment of goods under a bill of lading marked "prepaid," the carrier is estopped from collecting the freight charges from the consignee. *See Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219, 1222 (8th Cir. 1972); *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56, 62-63 (7th Cir. 1971); *United States v. Mason & Dixon Lines, Inc.*, 222 F.2d 646, 650 (6th Cir. 1955); *Davis v. Akron Feed & Milling Co.*, 296 F. 675, 677 (6th Cir. 1924); *C.F. Arrowhead Services, Inc. v. AMCEC Corp.*, 614 F. Supp. 1384, 1388 (N.D. Ill. 1985); *Mason & Dixon Lines v. Crossville Rubber Products, Inc.* 414 F. Supp. 166, 169 (M.D. Tenn. 1976); *Missouri Pacific RR Co. v. Lake Charles Grain and Grocery Co.*, 320 F. Supp. 1064, 1065-66 (W.D. La. 1971); *Missouri Pacific RR Co. v. National Milling Co.*, 276 F. Supp. 367, 369-70 (D.N.J. 1967), *aff'd*, 409 F.2d 882 (3d Cir. 1969); *In Re Penn-Dixie*, 6 B.R. at 822; *cf. In Re Roll Form Products, Inc.*, 662 F.2d at 154 n.7; *Farrell Lines, Inc. v. Titan Industrial Corp.*, 306 F. Supp. 1348, 1351 (S.D.N.Y.), *aff'd*, 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970). This estoppel arises because, if, in addition to paying for the goods, the consignee has paid the freight charge to the consignor, and has then accepted the goods in reliance on a bill of lading marked "prepaid," the carrier cannot force the consignee to pay the freight charges a second time. Allowing the carrier to collect the freight charges from the consignee in such a situation would be unjust for two reasons. First, it would require the consignee to pay twice for services rendered only once. Second, a consignee's protection against being asked to pay the freight charges twice is the consignee's right to refuse to pay the consignor until the consignee is satisfied that the freight charges have been paid. If the carrier convinces the consignee that the freight charges have been paid by showing the consignee a bill of lading marked "prepaid," and if, in reliance on this bill of

lading the consignee accepts the shipment and pays the consignor, the carrier is estopped from denying that the freight charges were prepaid and demanding payment from the consignee. This analysis has been implicitly adopted by the Supreme Court, *see Southern Pacific*, 456 U.S. at 347-48; 351, and by the Court of Appeals for the Third Circuit, *see Missouri Pacific RR Co. v. National Milling Co.*, 409 F.2d 882, 885 (3d Cir. 1969), and this court will adopt it as well. Since the bills of lading under which the carrier is asserting a claim for freight charges are marked "prepaid," judgment is properly entered against the carrier.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EF OPERATING CORP., *et. al.*	:	Civil Action
v.	:	
AMERICAN BUILDERS, *et. al.*	:	No. 92-0858

ORDER

(Filed May 18, 1992)

CAHN, J. May 18, 1992

AND NOW, this 18th day of May, 1992, upon consideration of the Motion for Summary Judgment filed by defendant M.P. Flaherty, IT IS ORDERED that the Motion is GRANTED, and judgment is ENTERED against plaintiff EF Operating Corp. and in favor of defendant M.P. Flaherty.[1]

---

[1] The plaintiff in this case is a common carrier. As such, it is governed by the terms of the Interstate Commerce Act (presently codified at 49 U.S.C. § 10101, *et. seq.*). Although the Interstate Commerce Act has been recodified several times, the substance of the Act has not changed. *See In Re Roll Form Products, Inc.*, 662 F.2d 150, 153 n.5 (2d Cir. 1981). The plaintiff now seeks to recover freight charges from the consignee (the recipient) of several shipments of goods, since it has been unable to recover these charges from the consignor (the shipper). In support of its claim, the carrier relies upon the rule that a common carrier *must* recover the charges due under the applicable tariff. *See Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 343-44 (1982); *Pittsburgh, Cincinnati, Chicago & St. Louis RR Co. v. Fink*, 250 U.S. 577, 581-82 (1919). Like most rules, however, there is an exception. *See In Re Penn-Dixie Steel Corp.*, 6 B.R. 817, 820 (Bankr. S.D.N.Y. 1980), *aff'd*, 10 B.R. 878

BY THE COURT:

/s/ Edward N. Cahn
Edward N. Cahn, J.

(S.D.N.Y. 1981).

Specifically, if a consignee has accepted a shipment of goods under a bill of lading marked "prepaid," the carrier is estopped from collecting the freight charges from the consignee. *See Southern Pacific Transportation Co. v. Campbell Soup Co.*, 455 F.2d 1219, 1222 (8th Cir. 1972); *Consolidated Freightways Corp. of Del. v. Admiral Corp.*, 442 F.2d 56, 62-63 (7th Cir. 1971); *United States v. Mason & Dixon Lines, Inc.*, 222 F.2d 646, 650 (6th Cir. 1955); *Davis v. Akron Feed & Milling Co.*, 296 F. 675, 677 (6th Cir. 1924); *C.F. Arrowhead Services, Inc. v. AMCEC Corp.*, 614 F. Supp. 1384, 1388 (N.D. Ill. 1985); *Mason & Dixon Lines v. Crossville Rubber Products, Inc.*, 414 F. Supp. 166, 169 (M.D. Tenn. 1976); *Missouri Pacific RR Co. v. Lake Charles Grain and Grocery Co.*, 320 F. Supp. 1064, 1065-66 (W.D. La. 1971); *Missouri Pacific RR Co. v. National Milling Co.*, 276 F. Supp. 367, 369-70 (D.N.J. 1967), *aff'd*, 409 F.2d 882 (3d Cir. 1969); *In Re Penn-Dixie*, 6 B.R. at 822; *cf. In Re Roll Form Products, Inc.*, 662 F.2d at 154 n.7; *Farrell Lines, Inc. v. Titan Industrial Corp.*, 306 F. Supp. 1348, 1351 (S.D.N.Y.), *aff'd*, 419 F.2d 835 (2d Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970). This estoppel arises because, if, in addition to paying for the goods, the consignee has paid the freight charge to the consignor, and has then accepted the goods in reliance on a bill of lading marked "prepaid," the carrier cannot force the consignee to pay the freight charges a second time. Allowing the carrier to collect the freight charges from the consignee in such a situation would be unjust for two reasons. First, it would require the consignee to pay twice for services rendered only once. Second, a consignee's protection against being asked to pay the freight charges twice is the consignee's right to refuse to pay the consignor until the consignee is satisfied that the freight charges have been paid. If the carrier convinces the consignee that the freight charges have been paid by showing the consignee a bill of lading marked "prepaid," and if, in reliance on this bill of

lading the consignee accepts the shipment and pays the consignor, the carrier is estopped from denying that the freight charges were prepaid and demanding payment from the consignee. This analysis has been implicitly adopted by the Supreme Court, *see Southern Pacific*, 456 U.S. at 347-48; 351, and by the Court of Appeals for the Third Circuit, *see Missouri Pacific RR Co. v. National Milling Co.*, 409 F.2d 882, 885 (3d Cir. 1969), and this court will adopt it as well. Since the bills of lading under which the carrier is asserting a claim for freight charges are marked "prepaid," judgment is properly entered against the carrier.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EF OPERATING CORPORATION t/a WEST MOTOR FREIGHT OF Pa.,	:	NO. 92-CV-0858
	:	ATTORNEY I.D. NO. 45112
Plaintiff	:	ASSIGNED TO: JUDGE EDWARD N. CAHN
v.	:	
AMERICAN BUILDERS, et al.,	:	
Defendants	:	

ORDER

(Filed July 9, 1992)

AND NOW, this 7 day of July, 1992, it is ORDERED:

1) The following claims against the Defendants Chief Industries, Inland Buildings, Kabro-Kaiser Associated Inc. and Star Building Systems have been settled pursuant to local rule 23(b) and dismissed with prejudice.

2) The judgment against Defendant United Feeds is satisfied and dismissed with prejudice.

3) The claim against Defendant Guille Steel is dismissed without prejudice for failure to make service.

4) The claim against Defendant American Builders is dismissed for lack of Personal Jurisdiction pursuant to Fed. R. Civ. P. 12(6)(2).

5) Plaintiff's motion for summary judgment against Defendant M.P. Flaherty is denied and Defendant M.P. Flaherty Assoc.'s motion for summary judgment is granted and judgment is Entered against Plaintiff EF Operating Corporation.

6) Plaintiff's motion for summary judgment against Defendant Steel Corp. is denied and Defendant S.S. Fisher Steel Corp.'s motion for summary judgment is granted and judgment is entered against EF Operating Corp.

This is a final appealable decision pursuant to section 1291, title 28 of the United States Code.

BY THE COURT:

/s/ Edward N. Cahn
Edward N. Cahn, J.

APPENDIX D

Filed May 10, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1598

EF OPERATING CORPORATION,
T/A WEST MOTOR FREIGHT OF PA.,

Appellant

v.

AMERICAN BUILDING*; CHIEF INDUSTRIES;
GUILE STEEL; INLAND BUILDING;
KABRO-KAISER ASSOCIATED;
M.P. FLAHERTY ASSOC.; S.S. FISHER STEEL CORP.;
STAR BUILDING SYSTEMS; UNITED FEEDS
* (Dismissed as per Court's 11/9/91 Order)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

(D.C. Civil Action No. 92-00858)

Argued February 22, 1993

Before: HUTCHINSON, NYGAARD and SEITZ,
Circuit
Judges

(Opinion Filed May 10, 1993

JOSEPH T. BAMBRICK, JR., ESQ.
(Argued)
Joseph J. [sic] Bambrick, Jr., &
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Attorney for Appellant

PHILIP W. FISHER, ESQ. (Argued)
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OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

The primary issue on appeal is whether under the Interstate Commerce Act, 49 U.S.C. § 10101 et seq., consignees must pay a common motor carrier for shipment of goods received even though the consignees had paid the shipper-consignor for the freight charges and the carrier delivered the goods under a bill of lading marked "prepaid." The district court concluded that under these circumstances the carrier was precluded from collecting freight charges from the consignees. We will affirm.

I.

EF Operating Corporation is a common motor carrier which has its tariffs on file with the Interstate Commerce Commission. Tex-Ark Joist Company requested EF Operating to transport shipments of steel joists and attachments from its facilities in Lebanon, Pennsylvania to various locations in and out of the state. After completing the deliveries, EF Operating asked for payment, but Tex-Ark refused to pay. Later, as a result of a Chapter 11 bankruptcy, Tex-Ark had no money to pay its unsecured creditors, including EF Operating.

EF Operating then requested payment from consignees of Tex-Ark. including S.S. Fisher Steel Corporation and M.P. Flaherty Associates, Inc. When the consignees refused to pay because they had already paid the freight charges to Tex-Ark, EF Operating sued in federal district court under the Interstate Commerce Act. All the consignee-defendants eventually settled, except Fisher and Flaherty.

EF Operating moved for summary judgment, contending that the Interstate Commerce Act required the defendants to pay. Fisher and Flaherty cross-moved for summary judgment, contending that they had already paid the freight charges to Tex-Ark as indicated by "prepaid" marks on the freight bills and delivery tickets attached to the bills of lading. The district court denied EF Operating's motion and granted summary judgment for Fisher and Flaherty. EF Operating appeals.

II.

Before we reach the merits of the summary judgment, we must confront a jurisdictional matter. Along with its summary judgment motion Flaherty also moved the district court to dismiss the complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). The district court did not explicitly rule on this motion. Instead, it ruled in favor of Flaherty on the merits; at the same time it ruled in favor of another defendant, American Buildings Company, which had raised the same jurisdictional defense. The logical conclusion to be derived from this is that the district court decided against Flaherty on the jurisdictional issue, albeit implicitly.

Although EF Operating appeals from the final order granting summary judgment for the appellees, Flaherty did not file a cross-appeal to contest the personal jurisdiction issue. Rather, it contests the issue in response to EF Operating's appeal. Unlike subject matter jurisdiction, which may be raised by any party or court at any time, see Wright & Miller, 5A Federal Practice and Procedure, § 1391 at 764-75 (1990), parties must affirmatively raise a personal jurisdiction defense in a timely manner under Federal Rules of Civil Procedure 12(g) and 12(h)(1), lest it be deemed waived. *Id.* § 1391 at 741-44; *Myers v. American Dental Ass'n*, 695 F.2d 716, 720 (3d Cir. 1982).

It is axiomatic that any party contesting an unfavorable order or judgment below must file an appeal. It is also well established that an appellee may, without taking a cross-appeal, support the judgment as entered through any matter appearing in the record, though his argument

may attack the lower court's reasoning or bring forth a matter overlooked or ignored by the court. *United States v. American Ry. Express Co.*, 265 U.S. 425, 44 S.Ct. 560, 564 (1924); *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 686 n.16 (1979); *Schweiker v. Hogan*, 457 U.S. 569, 102 S.Ct. 2597, 2607 n.24 (1982). This is simply a corollary to the rule that a reviewing court may affirm the lower court's decision on any basis. *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1089 n.10 (3d Cir. 1988); *Johnson v. Orr*, 776 F.2d 75, 83 n.7 (3d Cir. 1985). A grant of summary judgment and a dismissal for lack of personal jurisdiction, however, are wholly different forms of relief. *Lucas v. Gulf & Western Indus., Inc.*, 666 F.2d 800, 805 (3d Cir. 1981). The latter is a dismissal without prejudice, whereas the former is a ruling on the merits which if affirmed would have preclusive effect. *Id.* By seeking dismissal of the complaint for lack of personal jurisdiction. Flaherty is not seeking to support the summary judgment on different grounds. Cf. *Reserve Ins. Co. v. Brokerage Surplus Corp.*, 570 F.2d 487, 491 (3d Cir. 1978); *Bullard v. Sercon Corp.*, 846 F.2d 463, 467-68 (7th Cir. 1988). Rather, it seeks to vacate the summary judgment. *Lucas*, 666 F.2d at 805. Thus, where an appellant files an appeal seeking review of a summary judgment for the appellee, the appellee must cross-appeal to contest the district court's adverse ruling on his motion to dismiss for lack of personal jurisdiction. *Lucas*, 666 F.2d at 805. See *Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985) (appellee must cross-appeal to argue that the district court should have ruled on the merits and dismissed a habeas claim with prejudice where the court denied relief without prejudice). Since Flaherty did not cross-appeal, we have jurisdiction to

review the district court's summary judgment ruling only.[1]

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[1] We note that in *Lucas* we opined that the requirement of a cross-appeal under Federal Rule of Appellate Procedure 4(a)(3) "has been held to be a rule of practice rather than a limitation on appellate power." 666 F.2d at 805, citing *Scott v. University of Delaware*, 601 F.2d 76, 82-83 (3d Cir. 1979). The circuits are split on this issue. *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-16 (7th Cir. 1989).

We believe that current Supreme Court jurisprudence on procedural rules and time requirements seriously undermines the notion that the filing of a cross-appeal is a rule of practice. "Recent Supreme Court decisions have strictly construed the rules of procedure and prescribed time limits." *Smith v. Evans*, 853 F.2d 155, 160 (3d Cir. 1988). For example, in *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 98 S.Ct. 556 (1978), the Supreme Court held that an appeal is jurisdictionally defective because a motion under Federal Rule of Civil Procedure 59 was untimely and did not toll the time for filing a notice of appeal. Recently, in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405 (1988), the Supreme Court held that the requirements of Federal Rules of Appellate Procedure 3 and 4 are mandatory and jurisdictional, and that the failure to name a party in the notice of appeal constitutes a jurisdictional bar to appellate review as to that party. In so doing, the Court overruled *Williams v. Frey*, 551 F.2d 932, 934 n.1 (3d Cir. 1977), where this court applied the requirements of Rules 3 and 4 as rules of practice rather than as jurisdictional limitations. 108 S.Ct. at 2407 n.1. Although *Torres* concerned the initial notice of appeal by the appellant under Rule 4(a)(1) whereas a cross-appeal by an appellee is invoked under Rule 4(a)(3), this distinction is illusory in light of the broad language the *Torres* Court used. *Id.* at 2408-09. Just as other provisions of the federal rules of procedure have been found to be jurisdictional, see, e.g., *Fuente v.*

III.

Our review of summary judgment is plenary. *Metzger v. Osbeck*, 841 F.2d 518, 519 (3d Cir. 1988). We must consider the facts in light most favorable to the nonmovant and determine whether there is a genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c).

Counsel for EF Operating represented in his appellate briefs that the "facts of the present case are not in dispute" and in no less than three places in his appellate brief stated that the "goods were transported pursuant to a bill of lading marked 'prepaid'." Nonetheless, he attempted to repudiate this at oral argument and contend that only the freight bills and delivery tickets, and not the bills of lading, were marked "prepaid." The significance of this, he contends, is that the bill of lading is the only document controlling the duties and responsibilities of the carrier and shipper, and since it was not marked "prepaid" the charges cannot be considered so.

Although a review of the bills of lading does support the *factual* assertion made at oral argument, counsel for EF Operating did not present this legal argument to the

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Central Elec. Coop., Inc., 703 F.2d 63, 65 (3d Cir. 1983) (per curiam) (ten day period of Federal Rule of Civil Procedure 59(e) is jurisdictional), there is no reason to believe that the specific time requirement of Rule 4(a)(3) is not jurisdictional. See *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R.*, 806 F.2d 14, 15 (2d Cir. 1986); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 239 n.2 (5th Cir. 1990); *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 477 (7th Cir. 1984); *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 888-89 (10th Cir. 1984).

district court. Rather, he moved for summary judgment, specifically asserting both in the district court and in his brief here that there was no genuine issue of material facts that the bills of lading were marked "prepaid." Moreover, in both courts he advanced the legal argument that consignees cannot assert equitable defenses such as prepayment to shipper when the carrier has not recovered its freight charges from the shipper-consignor. We see no reason why counsel for EF Operating may make this belated revelation on appeal, at oral argument no less, and thereby repudiate his representations relied upon by the appellees, the district court and this court. Representations made in briefs inform opposing parties and the court of concessions, the specific contentions being raised and the facts and laws relied upon to make them. The smooth, efficient working of the judicial process depends heavily upon the assumption that such representations will be made after careful, deliberate evaluation by skilled attorneys who must ultimately accept responsibility for the consequences of their decisions. It goes without saying that one cannot casually case [sic] aside representations, oral or written, in the course of litigation simply because it is convenient to do so, and under the circumstances here, a reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations. Cf. *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992).

The bill of lading operates as both the receipt and the basic transportation contract between the shipper-consignor and the carrier, and its terms and conditions are binding. *Texas & P. Ry. Co. v. Leatherwood*, 250 U.S. 478, 39 S.Ct. 517, 518 (1919); *Louisville & Nashville R. Co. v. Central Iron & Coal Co.;* 265 U.S. 59, 44 S.Ct. 441, 443 (1924). As a contract, it is subject to general rules of construction under contract law. *Texas & Pacific Ry. Co. v. Reiss*, 183 U.S. 621, 22 S.Ct. 253, 257 (1902); *Maggard Truck Line, Inc. v. Deaton, Inc.*, 573 F.Supp. 1388, 1392 (N.D. Ga. 1983). And as a contract of adhesion between the carrier and shipper, it is strictly construed against the carrier. *Interocean S.S. Corp. v. New Orleans Cold Storage & Warehouse Co., Ltd.*, 865 F.2d 699, 703 (5th Cir. 1989); *Allied Chem. Int'n Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 482 (2d Cir. 1985). The assertion that the bills of lading here were not marked "prepaid" is accurate in only the narrowest sense. While the bills proper were not marked prepaid, they specifically referred to attached delivery tickets, which were clearly marked "prepaid," Moreover, EF Operating later sent to the shipper-consignor Tex-Ark freight bills that were also clearly marked "prepaid." Under these circumstances, the representations made by counsel for EF Operating before the district court and in his appellate briefs are accurate: the facts are not disputed; the bills of lading, as they reference to other documents, indicate that the consignees paid the freight charges to Tex-Ark; EF Operating knew and understood that the consignees had paid the charges; and it expected payment from Tex-Ark, and not the consignees.

With that behind us, we consider the primary issue on appeal. EF Operating relies heavily upon *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 496 U.S. 116, 110 S.Ct. 2759 (1990), to advance the proposition that no equitable defense can stand in the way of a common carrier's right to recover charges due under the applicable tariff. This reliance is misplaced. In *Maislin* the Supreme Court considered the validity of an Interstate Commerce Commission policy that relieved a shipper of the obligation of paying the filed rate when the shipper and carrier have privately negotiated a lower rate. Reasoning that the filed rate is the only legal rate a carrier may charge, a rule commonly known as the "filed rate doctrine," the Court held that a carrier must collect the filed rate, irrespective of the reasonableness of the carrier's practice in deviating from the terms of a private agreement with the shipper, 110 S.Ct. at 2768. This rigid and harsh doctrine was necessary to prevent discriminatory pricing schemes sprung from the practice of intentionally "misquoting" rates to shippers as a means of offering them rebates or discounts. *Id.* at 2766. Thus, the Court forbade the assertion of any equitable defenses to the collection of the file tariff, as opposed to some other rate.

Contrary to what EF Operating asserts, the *Maislin* Court did not hold that a carrier must, regardless of the circumstances, receive its freight charges; rather, it held that the rate charged must be the filed rate. This appeal does not concern whether EF Operating is entitled to charge its filed rate instead of some privately negotiated rate, or whether there is some danger of approving unlawful, discriminatory pricing schemes if EF Operating

is not allowed to collect its freight charges. The consignees have paid for services rendered, and have paid the proper filed rates. So, the question is not what rates the carrier should charge, but from whom the carrier should seek payment.

The shipper-consignor, Tex-Ark on this case, "assumes the obligation to pay the freight charges, and his obligation is ordinarily a primary one." *Louisville & Nashville R.*, 44 S.Ct. at 443. We have held that when a carrier delivers goods under a bill of lading marked "prepaid," and when the consignee pays the shipper-consignor the freight charges under this bill, equitable estoppel precludes the carrier from collecting those charges from the consignee, *Missouri Pacific R.R. Co. v. National Milling Co.*, 409 F.2d 882, 884 (3d Cir. 1969). The rationale is simple: if the consignee has performed its purchase agreement in good faith by paying the shipper for freight charges, and if the carrier knows this and acknowledges the payment by marking the bill of lading "prepaid," the carrier is then estopped from forcing an innocent consignee to pay twice for services rendered only once. Other courts have agreed. See *United States v. Mason & Dixon Lines, Inc.*, 222 F.2d 646, 650 (6th Cir. 1955); *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56, 62-63 (7th Cir. 1971); *Southern Pacific Transp. Co. v. Campbell Soup Co.*, 455 F.2d 1219, 1222 (8th Cir. 1972).

The Supreme Court has also implicitly adopted this reasoning. In *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 102 S.Ct. 1815 (1982), the consignor shipped goods to the consignee under bills of lading that provided that the consignor would be primarily liable for freight charges to the carrier, unless the

consignor signed a "nonrecourse" clause providing that the "carrier shall not make delivery of this shipment without payment of freight and all other lawful charges." The consignor failed to execute this clause, and when the consignee failed to pay the carrier, the carrier sought payment from the consignor.

Reasoning that the bill of lading is the basic transportation contract between the shipper-consignor and the carrier, the Court held that the consignor was liable for the freight charges because it failed to execute the nonrecourse provision. 102 S.Ct. at 1820. It opined that the consignor, being the one who contracts with the carrier to transport goods, is originally and primarily liable for the carrier's charges, unless it is specifically exempted by the bill of lading, or unless the goods are transported under such circumstances as to indicate an exemption for him. *Id.*, quoting *In re Bills of Lading*, 52 I.C.C. 671, 721 (1919).

The Court then distinguished *Consolidated Freightways Corp. v. Admiral Corp.*, 442 F.2d 56 (7th Cir. 1971), and by so doing it sanctioned a situation where a party is exempted under circumstances that suggest an estoppel defense is in order. The Court summarized the facts in *Admiral:*

> The defendant there was a *consignee* to whom goods had been delivered under bills of lading marked "prepaid." Relying upon the carrier's explicit representation of prepayment, the consignee paid the amount of the freight charges to the shipper-consignor. In fact, however, the carrier had extended credit to the consignor and had failed to collect the charges within the period allowed by the regulations. When the

> consignor went out of business, the carrier turned to the consignee for payment.

102 S.Ct. at 1822 (emphasis in original). The Court noted that the consignee in *Admiral* was entitled to an equitable estoppel defense because it had detrimentally relied on the carrier's misrepresentation that the freight charges were "prepaid" and because it had no means to protect itself from freight charge liability. *Id.* at 1822-23. Moreover, since the consignee had paid full freight charges to the consignor, the Court recognized that an award of relief to the carrier would have " 'require[d] an innocent consignee to defray freight charges exactly double the amount contemplated by the applicable tariff.' " *Id.* at 1822, quoting *Admiral*, 442 F.2d at 65 (Stevens, J., concurring).

Since Fisher and Flaherty had paid the freight charges to Tex-Ark, and since EF Operating knew of these payments as evidenced by the bills of lading and other documents marked "prepaid," EF Operating is precluded from collecting its freight charges against these consignees. See *Id.; Missouri Pacific*, 409 F.2d at 884; *Admiral*, 442 F.2d at 62-63.

IV.

We hold that when a shipper-consignor defaults on payment of freight charges, equitable estoppel precludes a carrier, delivering goods under bills of lading marked "prepaid," from collecting freight charges from an innocent consignee who had paid the shipper-consignor. We

will affirm the order of the district court granting summary judgment to the consignees Fisher and Flaherty.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX E

UNITED STATS [sic] COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1598

EF OPERATING CORPORATION,
T/A WEST MOTOR FREIGHT OF PA,
Appellant

V.

AMERICAN BUILDINGS*; CHIEF INDUSTRIES; GUILE STEEL; INLAND BUILDINGS; KARBRO-KAISER ASSOCIATED; M.P. FLAHERTY ASSOC.; S.S. FISHER STEEL CORP.; STAR BUILDING SYSTEMS; UNITED FEEDS
* (Dismissed as per Court's 11/9/91 Order)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges,* and SEITZ, *Senior Judge***

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

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** Judge Seitz voted only on panel rehearing.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ R. Illegible
Circuit Judge

Dated June 3, 1993